May 23, 1996

By FEDERAL EXPRESS

Hon. Mary L. Cottrell
Secretary
Massachusetts Department of Public Utilities
100 Cambridge Street, Room 1210
Boston, Massachusetts 02202

Re: D.P.U. 96-100 - Electric Industry Restructuring

Dear Secretary Cottrell:

These comments are submitted on behalf of the Massachusetts Oilheat Council, Inc. (MOC) in response to the Department's solicitation of comments in its Order of May 1, 1996 in the above-referenced proceeding.

MOC is a statewide trade organization representing independent energy marketers engaged in the distribution of energy products and services, including petroleum, natural gas, electricity and other products to residential, commercial and industrial consumers throughout the State of Massachusetts.

The restructuring program initiated by the Department in its May 1, 1996 Decision, represents a thoughtful and comprehensive approach to transforming the electric industry into a form more compatible with the needs of the consuming public. The

Department has grappled with the central issues involved in transforming the current

system of total regulation to one in which competition and market forces will determine the cost and quality of electric service available to consumers. In response to the Department's invitation, MOC respectfully provides the following comments with respect to certain issues addressed in the Decision.

The successful transition from the existing regulated system must rely to the maximum degree possible upon market forces. There are, of course, many important issues and problems which need to be resolved as the restructuring of the electric industry progresses; however, as the Department properly concluded, consumers are best served by the interplay of open and free market forces rather than a command and control regulatory structure that has characterized the electric system to date. This principle needs to be consistently applied, even where the perfect solution is unclear.

*A. **Power Exchange*** (Decision pp. 22-25)

MOC concurs with the Department that complete separation between the Power Exchange (PE) and the Independent Service Operator (ISO) is most appropriate, will avoid problems related to market power and affiliate transactions, and minimize disputes and second guessing of dispatch orders issued by the ISO.

To enhance the development of a "robust" market for generation, we support the approach which requires electric companies to sell all their generation into the PE, and thereafter purchase power on behalf of their customers from the PE. This approach minimizes the ability of electric utilities to use their monopoly status to enhance their market position, and prevents utilities from instituting marketing practices that favor their own generation sources at the expense of independent suppliers. And, most importantly, it will enable a competitive marketplace to develop quickly and forcefully by ensuring that generation goes into the PE, and that different sources of generation are available for distribution to consumers throughout the State. This more robust PE will then entice other suppliers to interact with the PE, secure in the knowledge they will have a chance to compete with the utility on a more equal footing.

*B. **Corporate Structure*** (Decision, p. 25)

The Department's recommendation that functional separation as defined at page 26 of the Decision be implemented, is prudent and an important first step in ensuring the

transition to a competitively based electric industry. We recognize that mandatory divestiture at this point in time may not be feasible; nonetheless, it is important to recognize that development of a workable restructured system may necessitate such divestiture.

Even with a holding company/subsidiary structure, the potential for abuse still exists and significant review and regulation, especially through a complaint process, will be necessary. The maintenance of this structure could, especially if the electric companies were not directed to sell their generation into the PE, undermine the development of the PE and in turn hinder the growth of a competitive market. It should be understood even where a holding company approach is used, subsidization and other uncompetitive activities between the holding company and its affiliate or between the affiliates can occur. Absent continual monitoring by the Department, a development which it clearly seeks to avoid, the potential for abuse remains strong.

C. ***Antitrust Impact*** (Decision, p. 27)

We share the Department's concern over the need to ensure the provision of competitive services by regulated entities or their affiliates which comply with the applicable State and Federal anti-trust laws. Nonetheless, the statement set forth at page 28 of the Decision, as well as the proposed regulation at Section 11.06(3)(i), is insufficient to ensure that utilities are not shielded from antitrust liability, even when they engage in competitive activities which violate the antitrust laws.

MOC therefore proposes that the regulation be amended to include the following statement: where a utility, its parent, affiliate or subsidiary, engages in competitive services, such activities will not be deemed to be made to be subject to a clearly

articulated and expressed state policy or actively supervised by the state; such activities will be subject to the provisions of the antitrust laws and the state action immunity doctrine would not apply.

In addition, each utility, its affiliate or subsidiary which engages in such activity should be required to execute a written statement in which this provision is formally agreed to.

All participants in the electric restructuring, whether an independent supplier or a utility, must be apprised that the shield of State Action immunity will no longer be applicable where competitive services are provided.

D. Load Aggregators - Registration Requirements (Decision, p. 34)

The proposed registration requirements are sufficient to address the concerns raised by the Department. However, the Decision does not address whether and to what extent the Department will seek to regulate independent suppliers. In our view, except for the limited registration requirements set forth in the proposed regulations, there should be no other assertion of Department jurisdiction over the operation and activities of the independent suppliers. As the Department noted, the relationship between the customer and the independent supplier will be a contractual one, not covered by the regulations and supervision of the Department. For this type of market-based competitive relationship to develop, the spector of regulation must not be allowed to cast a wide shadow. Accordingly, a specific statement by the Department outlining its lack of assertion of jurisdiction would be extremely helpful and useful.

The distribution company should be able to prevent slamming by requiring prior written approval from the consumer before allowing a supplier change. This will minimize slamming because a company that engages in such conduct would not be able to effectuate the transfer without first obtaining the consent of the customer.

E. Qualifying Facilities - Net Billing (Decision, pp. 41, 69)

The Department requests comments on whether there may be a need for a change in regulations to provide for payment to qualifying facilities (QF) at the market price for generation, rather than the retail sales rate. MOC believes that the existing policy is reasonable and should be maintained. Self generation through a QF, is especially important for small users that have not been able to benefit from the advances in generation technology, and in those areas where transmission and/or distribution constraints exist. This type of generation opportunity needs to be encouraged by the maintenance of the current net billing practice.

Additionally, the actual avoided costs associated with self generation includes generation, transmission and distribution costs. Consequently, net billing correctly reflects the avoidance of these specific costs by including all of them in the computation of the net billing credit. To only provide a credit for generation is unfair

and inequitable because it ignores the other significant costs which the utility is able to forego due to the installation of a QF facility. Accordingly, it is entirely appropriate to pay through net billing for generated power at a rate which encompasses the costs for generation, transmission and distribution.

The proposed regulations also create the mistaken impression that the practice of net billing is only applicable to renewables. Pursuant to Section 11.08, the net billing or power buyback provision is only referenced for renewable QFs, thereby calling into question whether net billing is available to QFs which are not renewable. This was, to our knowledge, not the intent of the Department and therefore the regulations should be amended to include a similar power buyback provision for non-renewable QFs, or a statement affirming that the existing provisions of Section 220 CMR 8.04(2)(c) remain in effect.

In conclusion, MOC extends its appreciation for the opportunity to comment on the proposed restructuring plan, and supports the effort by the Department to implement a

market based approach to meeting the electric needs of all consumers.

Respectfully submitted,

Massachusetts Oilheat Council, Inc.

By: _____
Usher Fogel
Its Counsel

UF/mac
cc: Michael J. Ferrante